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PADMAPPER, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CRAIGSLIST, INC., a Delaware corporation,

Plaintiff,

v.

3TAPS, INC., a Delaware corporation;  
PADMAPPER, INC., a Delaware corporation;  
DISCOVERY HOME NETWORK, INC., a  
Delaware corporation d/b/a LOVELY;  
BRIAN R. NIESSEN, an individual; and  
DOES 1 through 25, inclusive,

Defendants.

Case No. CV-12-03816 CRB

**PADMAPPER, INC.'S NOTICE OF  
MOTION AND MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Date: November 28, 2014  
Time: 10:00 a.m.  
Courtroom: 6, 17th Floor  
Judge: Hon. Charles R. Breyer

**NOTICE OF MOTION AND MOTION**

TO THE COURT, ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:  
PLEASE TAKE NOTICE THAT on November 28, 2014, at 10:00 a.m., or as soon thereafter as the  
matter may be heard, in the United States District Courthouse, Courtroom 6, 17th Floor,  
450 Golden Gate Avenue, San Francisco, California, before the Honorable Charles R. Breyer  
Defendant PadMapper, Inc. will, and hereby does, move the Court for summary judgment on  
Plaintiff craigslist, Inc.'s claims for copyright infringement, misappropriation, and trespass.

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## **SUMMARY OF ARGUMENT**

Pursuant to the Court’s Standing Order dated July 6, 2012, PadMapper provides the following summary of argument:

**Copyright:** craigslist may assert copyright claims based on either the individual Listings or the compilation of its database: (1) with respect to the individual Listings, PadMapper’s display of summary, factual material combined with its back-end use of the data underlying the Listings constitutes fair use under Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007) and Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003); (2) with respect to the compilation, craigslist’s curatorial efforts fail to satisfy the minimum originality, and PadMapper is not infringing on whatever minimal copyrights craigslist has because PadMapper uses totally different organizing principles. BellSouth Advertising & Publ’g Corp. v. Donnelley Information Publ’g, Inc., 999 F.2d 1436 (11th Cir. 1993).

**Trespass claim:** craigslist’s trespass claims are deficient because craigslist fails to produce evidence sufficient to create a material fact that PadMapper’s allegedly improper access of its site or servers caused damage or significant impairment as required under Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1347, 1 Cal. Rptr. 3d 32, 71 P.3d 296 (Cal. 2003).

**Misappropriation claim:** craigslist’s misappropriation claim is preempted by the Copyright Act. Summit Machine Tool Mfg. Corp. v. Victor CNC Sys., 7 F.3d 1434, 1441 (9th Cir. 1993). To the extent craigslist seeks to state a misappropriation claim under the “hot news” doctrine, it fails to satisfy several elements. The information is not time-sensitive in the way that breaking news is. Neither craigslist nor PadMapper sell access to the information in question. Finally, PadMapper is not “free-riding” on craigslist’s efforts. Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 979 (E.D. Cal. 2000).

**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

Defendant PadMapper, Inc. (“PadMapper”) operates an apartment rental search engine that allows apartment seekers to find and view information regarding apartment rental advertisements originating from nearly one hundred online sources, including ApartmentSearch.com, Rent.com, airbnb, ApartmentFinder, Realtor.com, and plaintiff craigslist, Inc. (“craigslist”). Despite the fact that consumers overwhelmingly believe that PadMapper complements and improves the experience of using craigslist to find apartments, craigslist seeks to stop PadMapper’s use of the apartment rental classified ad listings created and submitted to the craigslist website by users of the website (“Listings”). craigslist has asserted a number claims against PadMapper, including copyright infringement, trespass and misappropriation.

craigslist’s primary claim is copyright infringement, and it asserts that PadMapper has infringed copyrights in both individual Listings, as well as craigslist’s compilation comprised of all user postings on its website, including the Listings, and other aspects of the craigslist website (the “Compilation”). With respect to individual Listings, only those Listings posted to craigslist’s website from July 16, 2012 to July 19, 2012 are relevant to craigslist’s claims. This Court previously ruled craigslist did not obtain an exclusive license to Listings posted prior to July 16, 2012, and therefore cannot sue for infringement of those Listings. craigslist’s only application for copyright registration that can form the basis for an infringement action on the Listings does not cover Listings posted after July 19, 2012. In any event, PadMapper’s use of Listing information from this four-day window is either non-infringing, because the information is factual, or constitutes fair use because, among other things, PadMapper’s use of the information enables its search engine functionality, and is fundamentally transformative. With respect to craigslist’s Compilation, PadMapper has not infringed on any protectable element of craigslist’s selection or arrangement of the Listings in the Compilation. Moreover, when PadMapper’s website is compared to the craigslist Compilation as a whole, it is clear that there is no substantial similarity between the two. Accordingly, craigslist’s copyright claims against PadMapper must fail.

PadMapper also seeks summary judgment on craigslist’s trespass and misappropriation

claims because there is no factual dispute as to these claims.

## **BACKGROUND**

### **A. PadMapper's Acquisition and Use of Listing Information**

#### **1. PadMapper's current acquisition and use of Listing information.**

##### *a. 3Taps API*

PadMapper acquires information relating to Listings posted on craigslist from co-defendant, 3Taps, Inc. ("3Taps"), through an application programming interface made available by 3Taps (the "3Taps API"). (Declaration of Eric DeMenthon in Support of PadMapper's Mot. Summ J. ("DeMenthon Decl.") at ¶6.) In simple terms, the 3Taps API is a computer program that allows PadMapper's computer systems to communicate with, and obtain data from, 3Taps' computer systems. (*Id.* at ¶6.)

In order to obtain the Listing information from the 3Taps API, PadMapper formulates a request specifying the following: the topical category of Listing information (one of homes for rent, sublets, or rooms), the desired time period for the Listings (typically since the time of the last query), the data source for the Listings (craigslist), the desired elements of the Listing (the original URL for the Listing and the HTML for the web page corresponding to that URL), and the API key (which functions as a password and identifier all in one). (*Id.* at ¶7.) PadMapper then transmits the request to the 3Taps API. (*Id.* at ¶7.)

3Taps responds with a JSON, or JavaScript Object Notation, response. (*Id.* at ¶9.) This encodes a list of blocks of information. (*Id.* at ¶9.) Each block represents one listing, and contains a full set of the asked-for information. (*Id.* at ¶9.) In this case, that information consists of the original URL of the Listing and the full HTML of the particular Listing, in base64 encoding. (*Id.* at ¶9.) Base64 encoded information is not human-readable, and is used because it is more compact, and less likely to cause problems with the surrounding JSON. (*Id.* at ¶9.)

##### *b. Extraction of Data from 3Taps API Data*

PadMapper's computer system receives the JSON response, and converts it back into the original human-readable HTML format by running a function used to decode base64 encoded data. (*Id.* at ¶10.) For any particular Listing, once in the HTML format, PadMapper's program analyzes

1 the Listing information contained in the HTML and determines whether the information contains  
 2 enough location data to enable the Listing to be accurately mapped. (Id. at ¶12.) Listings vary with  
 3 respect to the amount of location information that they include, because a user creating a Listing  
 4 can supply varying levels of location information. (Id. at ¶12.) For instance, a user need not supply  
 5 an exact street address. (Id. at ¶12.) Where there is insufficient location data to pinpoint the location  
 6 of an apartment at least to the level of cross streets, that apartment will not appear on PadMapper's  
 7 website (i.e., no pin for it will be displayed on the apartment search map). (Id. at ¶13.) Listings for  
 8 which the HTML does not contain enough location data to accurately map are not desirable for  
 9 PadMapper's purposes because its user interface is map-based (as described in more detail below).  
 10 (Id. at ¶13.) Through this process, a significant percentage (varying historically between 40%-60%)  
 11 of the apartments for which PadMapper obtains information from 3Taps end up not being  
 12 presented. (Id. at ¶13.)

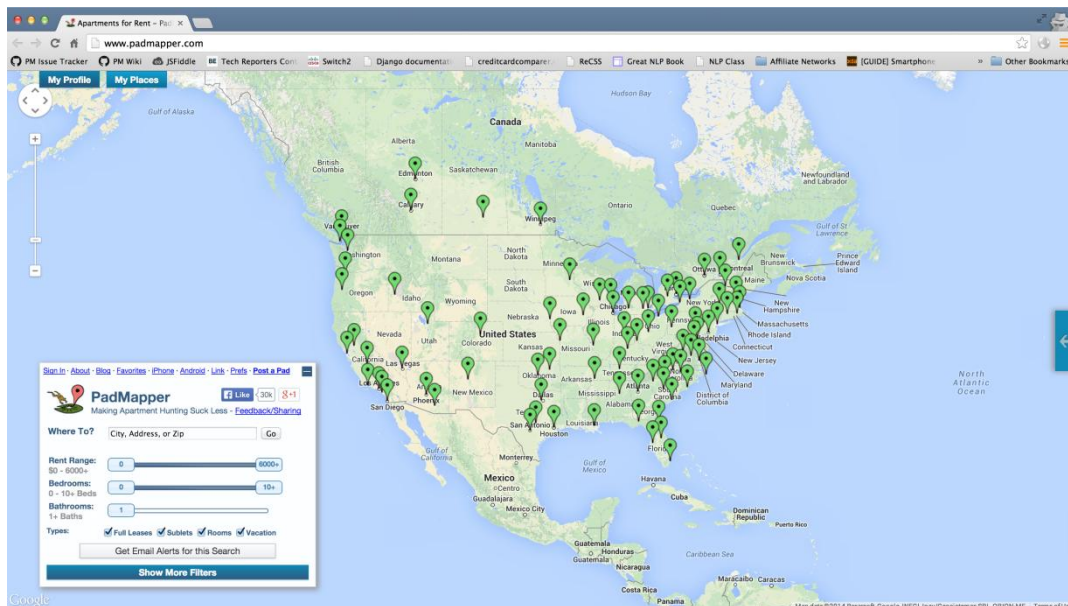
13 For those Listings that are not excluded, PadMapper extracts the following data:<sup>1</sup> (1) the  
 14 original URL address of the Listing, (2) the address of the property, (3) the latitude of the property,  
 15 (4) the longitude of the property, (5) the area/neighborhood in which it was posted, (6) the city,  
 16 (7) the price and lease term, (8) the number of bedrooms, (9) the number of full and partial  
 17 bathrooms, (10) whether the Listing has images, (11) the URL addresses of images, if applicable,  
 18 (12) whether cats and/or dogs are allowed, (13) whether it was posted by a broker or an individual,  
 19 (14) whether a broker charges a fee, if applicable, (15) email, if provided, (16) telephone number, if  
 20 provided, and (17) square footage (the "Listing Data"). (Id. at ¶14.) Using an algorithm, PadMapper  
 21 software derives the price per bedroom and the median price for a comparable rental in the area. (Id.  
 22 at ¶16.) All of the above data, with the exception of the URL addresses of any images, is then  
 23 placed into a "summary table." (Id. at ¶16.) If the Listing contained images, the URL addresses of  
 24 the images (but not the actual images files) are placed into a "listing image URL table." (Id. at ¶16.)  
 25 The full HTML for the Listing is placed into an "HTML table." (Id. at ¶17.) The full HTML for the  
 26

27  
 28 <sup>1</sup> Not all of the above data will necessarily be available for a specific Listing. Some information is  
 required by craigslist when creating a Listing, such as the price and number of bedrooms. The  
 provision of other information is optional, such as the square footage and telephone number.

Listing includes the free form text entered into the body of the Listing by the person who posted the listing (e.g., “Bright, sunny 1 bedroom apartment on 29th street in Noe Valley. Recently remodeled with granite countertops and near bus stops!”). (*Id.* at ¶17.) Photos, if they appear in the Listings, are not obtained by PadMapper, directly or indirectly, and never have been. (*Id.* at ¶16.)

*c. PadMapper’s Apartment Search Map*

Initially, a user visiting the PadMapper website sees PadMapper’s landing page, which by default shows a Google map of North America. (*Id.* at ¶25.) Overlaid on the map are green “pins,” each of which indicates the location of a city where one or more apartments are available for rent. (*Id.* at ¶25.) A search functionality box is also displayed in the user’s window, superimposed on the map. (*Id.* at ¶25.) In addition to a text input field which asks “Where to?” and requests a “city, address, or zip,” the search functionality box includes a number of filters that allow users to restrict the scope of a search. (*Id.* at ¶25.) These include filters for things such as rent range, number of bedrooms, number of bathrooms, and types of rentals (full leases, sublets, individual rooms, or vacation rentals). (*Id.* at ¶25, Ex. C.) (See Figure 1, below.)



**Figure 1**

As the user indicates a desired location in the search window and sets the filters to his or her liking, the apartment display map and the Listings on the map change to reflect what the user is asking for, whether that is a display of a smaller, more specific area (such as a particular city), or a display of listing pins that reflect apartments matching the more specific criteria provided by the



1 user through use of the filters. (*Id.* at ¶26, Ex. D.) (See Figure 2, below.) A user may also search my  
 2 scrolling and zooming on the apartment display map using Google’s standard map functions. (*Id.* at  
 3 ¶26.)

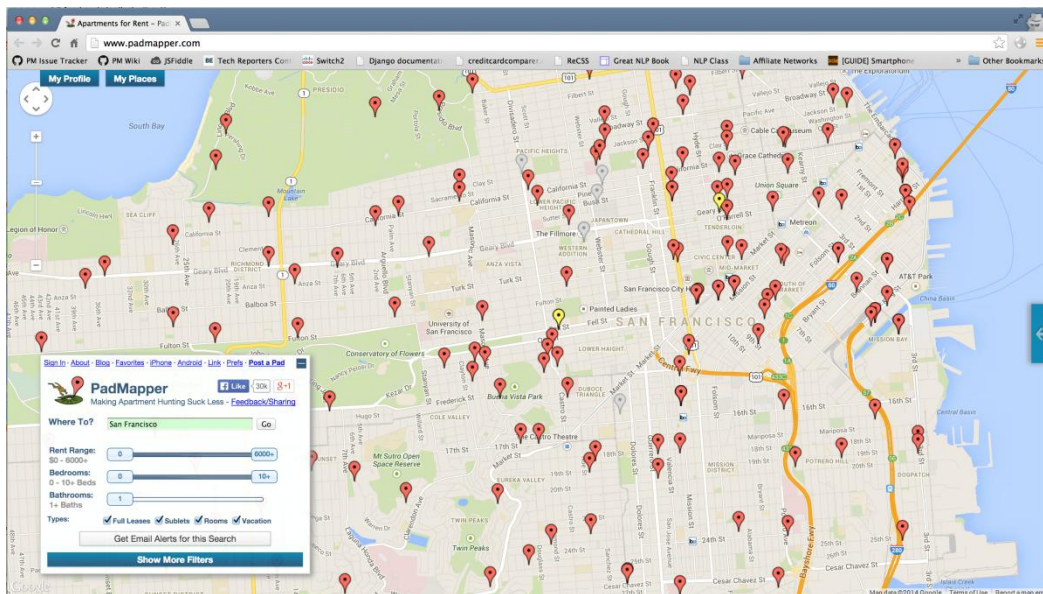


Figure 2

14 After the apartment search map is narrowed into a specific location, either by searching or  
 15 zooming on Google Maps, red or yellow pins appear which indicate the location of an available  
 16 apartment for rent. (*Id.* at ¶27.) When the user clicks on a pin, a pop-up bubble appears, displaying  
 17 summary factual information about the apartment represented by that pin (e.g., price, number of  
 18 bedrooms and bathrooms, term), attribution of the source of the Listing (e.g., craigslist, rent.com,  
 19 ApartmentFinder, airbnb) taken from the summary/search table created by PadMapper (the  
 20 “Summary Bubble”). (*Id.* at ¶27.) The Summary Bubble also displays a link to the original Listing,  
 21 as well as additional information generated by PadMapper, such as the rental price relative to the  
 22 median. (*Id.* at ¶28.) The Summary Bubble also has tabs that display Google’s “street view” and a  
 23 “walk score”—which are both features made available by third parties (Google and Walk Score)—  
 24 relative to the apartment. (*Id.* at ¶28, Ex. E.) (See Figure 3, below.)

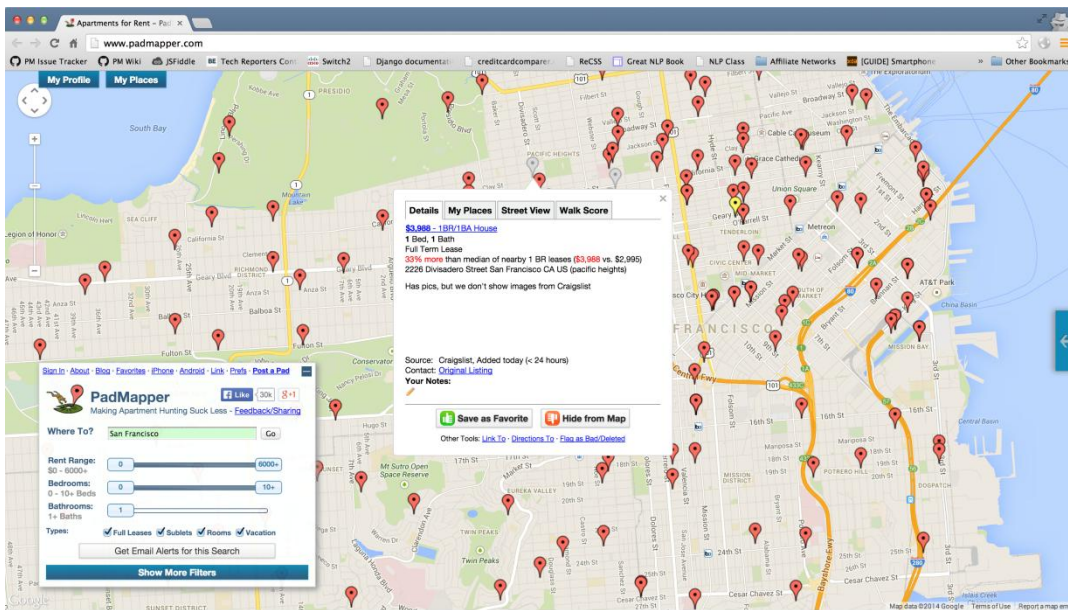


Figure 3

In order to see the full Listing on its original source (e.g. craigslist), including any photos that might be part of the Listing, the user clicks on one of the two links provided in the Summary Bubble (one near the top of the Summary Bubble labeled with the price, the other in the bottom third of the Summary Bubble, labeled “Original Listing”). (Id. at ¶29.) Doing so opens up a new browser tab displaying the Listing on the source website. (Id. at ¶29, Ex. F.) (See, e.g., Figure 4, below.)

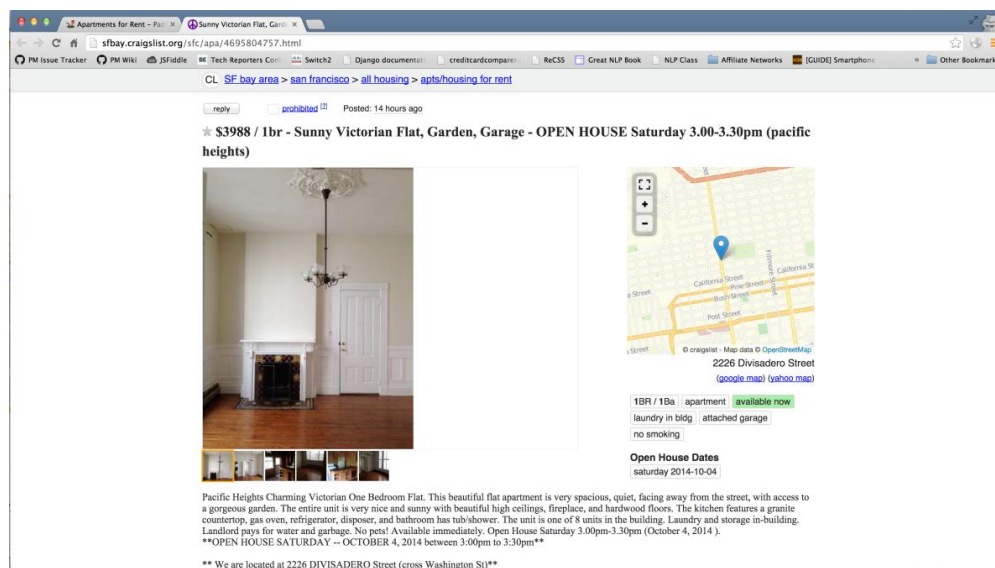


Figure 4

## 2. PadMapper’s prior acquisition and use of Listing information.

### a. *PadMapper Crawler*

Prior to June 22, 2012, PadMapper obtained information for Listings posted on craigslist

1 directly through the use of automated “crawler” software. (*Id.* at ¶19.) PadMapper’s crawler  
 2 software would periodically obtain the HTML of the first several pages of each city’s rental  
 3 Listings index and extract the URLs of each Listing. (*Id.* at ¶19.) Then, the software would visit  
 4 each URL and obtain a copy of the HTML of the Listing. (*Id.* at ¶19.) PadMapper would then  
 5 process the HTML information in the same manner as described above. (*Id.* at ¶19.)

6 *b. PadMapper Bar and Inline Linking of Listing*

7 Up until May 29, 2013 (except for a ten day period in May 2012), the PadMapper user  
 8 interface with respect to Listings originating from craigslist was slightly different. (*Id.* at ¶30.)  
 9 When a user would click on a link within Summary Bubble, the user’s browser would then display  
 10 a split screen, with a slim “PadMapper Bar” on the left side of the screen and an inline link to the  
 11 original craigslist Listing on the right side of the screen. (*Id.* at ¶30, Ex. G) (See Figure 5, below.)

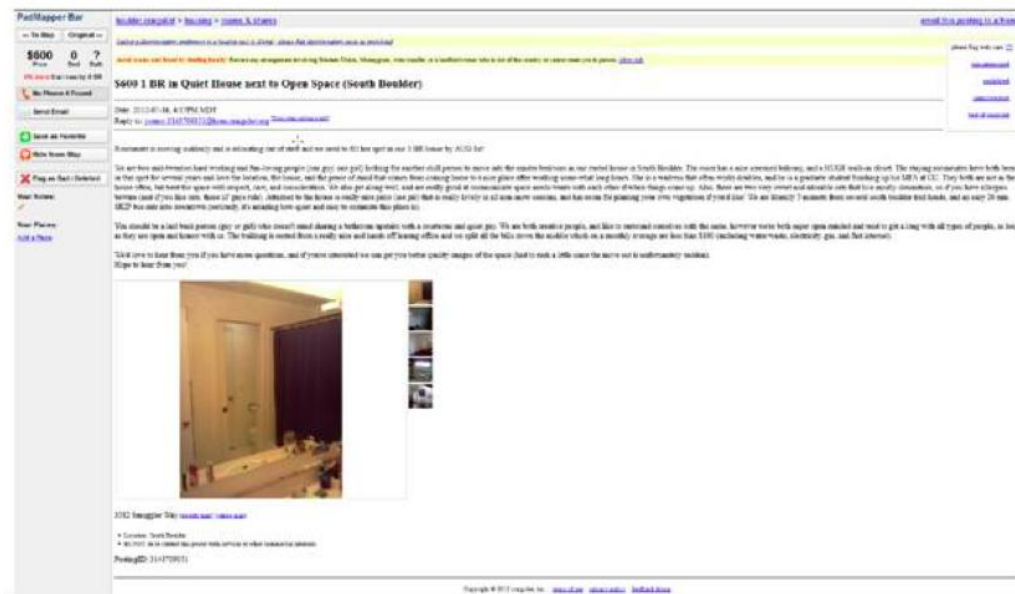


Figure 5

22 The inline link was created by placing a tag within the HTML for the PadMapper site, which  
 23 contained a URL address for the source page of the original Listing and directed a user’s Web  
 24 browser to load the actual source page for the Listing within the right side of the browser window.  
 25 (*Id.* at ¶31.) PadMapper did not copy the source page of the original Listing, rather, through the use  
 26 of inline linking, the source page was transmitted directly from craigslist’s servers to the user’s  
 27 Web browser directly, in response to the request from the user’s Web browser. (*Id.* at ¶31.) The  
 28 PadMapper Bar was similar to the currently used Summary Bubble, in that it included functions like



1 saving a Listing as a favorite or hiding the listing in future searches, as well as core factual  
 2 information about the Listing, e.g. “\$2,375 Price, 2 Bed, 1 Bath, 20% more than nearby 2 BR.” (Id.  
 3 at ¶31.)

4 3. No use of non-Listing craigslist data or content.

5 Although craigslist asserts that its website is “literally a ‘one stop shop’ for every sort of  
 6 local classified listing and associated communication that use may want or need,” (FAC ¶ 29),  
 7 PadMapper obtains and uses only a small slice of craigslist’s Compilation of user postings, those  
 8 pertaining to apartment rental listings, as described above. (DeMenthon Decl. at ¶24.) Thus, for  
 9 example, PadMapper does not use: the HTML for craigslist’s global homepage, listing all of its  
 10 local sub-sites (<http://www.craigslist.org/about/sites>); the HTML for the homepage of any particular  
 11 local craigslist sub-site (e.g., the Seattle-Tacoma local sub-site, <http://seattle.craigslist.org/>), which  
 12 lists all of the various classified ad categories offered by craigslist and links to craigslist’s various  
 13 website informational pages; any actual craigslist informational pages (e.g., its “Help” page  
 14 (<http://www.craigslist.org/about/help/> or “About” page (<http://www.craigslist.org/about/>); or the  
 15 HTML for the vast majority of the craigslist website consisting of various other categories of  
 16 classified advertising (e.g., personals, jobs, services, and items for sale). (Id. at ¶24.)

17 4. PadMapper’s unique display of Listings.

18 craigslist arranges its Compilation first by pre-determined “geographical communities” and  
 19 second, into “dozens of different categories and sub-categories” within each designated  
 20 geographical community, (Pl. Opp’n to Defs. MTD (Dkt. 60) at 18:2-5), which includes the  
 21 “housing” category, where the Listings are located within the Compilation. User posts are listed  
 22 chronologically in the order they are posted. This geographical ordering, categorization, and  
 23 chronological structure employed by craigslist is *not* used by PadMapper. (See DeMenthon Decl. at  
 24 ¶¶ 25-27.) PadMapper’s arrangement of the Listings is by the actual street location of the rental  
 25 placed on a Google map. (Id. at ¶¶ 25-27.) Although PadMapper does some prioritization of which  
 26 pins appear in a given area on the apartment search map by how recent the Listing was posted,  
 27 PadMapper also uses a number of additional factors when it organizes its data from Listings (e.g.,  
 28 whether or not a listing has pictures, whether the listing has received a lot of attention already, and

others). (*Id.* at ¶ 27.) In total, PadMapper’s own categorization or arrangement of Listings is materially different and bears no meaningful resemblance to craigslist’s categorization and arrangement.

**B. craigslist’s Users Support PadMapper’s Apartment Search Engine Functionality**

As craigslist alleged in its Complaint, upon receiving a cease and desist letter from craigslist, PadMapper stopped accessing craigslist’s website directly. (*Id.* at ¶¶ 19-20.) It made a public announcement regarding its inability to include craigslist Listings. (*Id.* at ¶ 19.) This resulted in a huge outpouring of emails to craigslist from users of craigslist and PadMapper. These emails, which craigslist produced in discovery, uniformly and emphatically make the point that PadMapper enhances use of craigslist, and that PadMapper is not a substitute for craigslist in any way. Rather, PadMapper made craigslist easier to use—*i.e.*, PadMapper’s search services *increased the demand for and usability of craigslist’s services* and drove consumers to the craigslist website. In fact, users who had never used craigslist previously, as well as former users who had stopped using craigslist because they found it too tedious and frustrating, remarked how PadMapper had connected them (or re-connected them) to craigslist. (Balasubramani Decl. ¶ 3, Ex A.)

**C. No Evidence of Actual Damages from PadMapper’s Alleged Trespass**

The Court ruled in its April 29, 2013 Order that in order to sustain a claim for trespass, craigslist must show “actual damage, such as impairment as to the condition, quality, or value of the system or deprivation of its use for a substantial time.” (Order on MTD (Dkt. 74) at 23.) The Court declined to rule on PadMapper’s argument at the motion to dismiss stage that its access of the craigslist site did not cause any impairment or actual damage, while noting the possibility that craigslist would not be able to show “actual damage or impairment.” craigslist has not produced any evidence of damage resulting from PadMapper’s alleged trespass. (Balasubramani Decl. at ¶ 5.)

**DISCUSSION**

**A. Summary Judgment Standard**

Summary judgment should be granted if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED R. CIV. P. 56(a). The burden of establishing the absence of a genuine issue of material fact lies with the moving party, *Celotex*

1 Corp. v. Catrett, 477 U.S. 317, 322-23 (1986), and the court must view the evidence in the light  
 2 most favorable to the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, (1986)  
 3 (citation omitted). Rule 56(c) mandates the entry of summary judgment against a party “who fails  
 4 to make a showing sufficient to establish the existence of an element essential to that party’s case,  
 5 and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. A fragment  
 6 of evidence in support of the non-movant’s position is insufficient to successfully oppose a  
 7 summary judgment motion; “there must be evidence on which the jury could reasonably find for the  
 8 [non-movant].” Anderson v. Liberty Lobby, Inc., 477 U.S. at 252.

9 **B. The Limited Scope of craigslist’s Copyright Registrations and Applications**

10 craigslist may not maintain an action for infringement of works not covered by its copyright  
 11 registrations. 17 U.S.C. § 411(a). Although craigslist has cited to six copyright registrations and  
 12 four pending applications for registration during the course of this litigation, only one of these—a  
 13 pending application—is relevant to craigslist’s claims against PadMapper. craigslist has identified  
 14 ownership of six issued copyright registrations: TX0006866657, TX0006866658, TX0006866660,  
 15 TX0006866661, TX0006866662 and TX0007547907. (See Kao Decl. in Support of Opp’n to MTD  
 16 (Dkt. 60-1), ¶¶ 7-11, 17.) craigslist has also identified four additional applications for registration.  
 17 (See Kao Decl. in Support of Opp’n to MTD (Dkt. 60-1), ¶¶ 12, 13, 15, 16.) However, of all of the  
 18 registrations and pending applications, craigslist admits that only one of these—a single pending  
 19 application—arguably extends copyright protection to individual Listings or the Compilations. (See  
 20 Opp’n to MTD (Dkt. 60) at 23, fn. 11 (“Defendants cite only to the presently issued registrations,  
 21 however, *which craigslist agrees do not extend to individual postings of the compilation of those*  
 22 *postings*. As alleged in the FAC, craigslist filed additional applications for registration prior to  
 23 filing this lawsuit, *one of which* expressly claims craigslist’s rights in the postings and *the*  
 24 *compilation*. FAC ¶ 52; see Kao Decl. Ex. F1.”) (emphasis added).<sup>2</sup> The application identified by  
 25 craigslist (attached as Ex. F1 to the Kao declaration) is titled “Group registration for automated  
 26

27  
 28 <sup>2</sup> Review of craigslist’s three other pending applications and supporting specimens bears out their  
 inapplicability to craigslist’s claims. The applications referenced in Kao Decl. ¶¶ 13, 15 and 16 do  
 not apply to Listings. They cover craigslist’s website homepage and primary supporting pages.

1 database titled Classified Ads Database; published updates from April 19, 2012 to July 19, 2012”  
 2 (the “Database Application”). (Kao Decl. in Support of Opp’n to MTD (Dkt.60-1), ¶ 12, Ex. F1.)  
 3 Consequently, the Database Application is the only copyright registration or application relevant to  
 4 craigslist’s copyright infringement claims against PadMapper. It is possible craigslist has submitted  
 5 additional applications for registration which craigslist has not disclosed to PadMapper in response  
 6 to discovery requests. But any such applications would not preclude summary judgment. The  
 7 analysis set forth below as to non-infringement and fair use would apply equally to such  
 8 applications.

9 As a result of craigslist’s single relevant application, the potential infringement period is  
 10 narrow: April 19, 2012 to July 19, 2012. However, the Court previously dismissed craigslist’s  
 11 copyright claims with respect to individual Listings submitted before July 16, 2012 or after August  
 12 8, 2012, the narrow period during which the Court determined that craigslist obtained an exclusive  
 13 license to listings submitted by craigslist users. (See Order on MTD (Dkt.74) at 14:20-22.)  
 14 Consequently, with respect to individual Listings, craigslist may only maintain an infringement  
 15 claim for those Listings posted *during the four day period* covering July 16, 2012 to July 19, 2012.

### 16 **C. craigslist Cannot Show Infringement of Copyright in the Individual Listings**

17 PadMapper displays, through its use of the Summary Bubble, only factual information  
 18 contained in Listings. (See DeMenthon Decl. at ¶¶ 14, 27.) Because facts are not subject to  
 19 copyright protection, PadMapper’s display of the factual information cannot constitute  
 20 infringement. Furthermore, PadMapper’s use of the factual information is transformative, and  
 21 therefore constitutes fair use. PadMapper makes limited use of the entirety of the text of Listings  
 22 (including the free-form body text entered by the person who created the listing) to facilitate its  
 23 search engine functionality. However, this use is also transformative and constitutes fair use.

#### 24 1. PadMapper’s display of factual Listings Data in the Summary Bubble is not 25 infringement.

26 PadMapper extracts the Listings Data from the HTML it receives from the 3Taps API,  
 27 including location data. (Id. at ¶14.) PadMapper software then automatically indexes the location  
 28 data into tables, which it uses to place the pins on the apartment search map that display the

Summary Bubbles (containing the above attributes) to a user on the PadMapper website. (See Id. at ¶¶16-17, 27-28.)

PadMapper’s apartment search map allows users to filter Listings by the user’s desired location, then display pins that represent the location of available Listings. (Id. at ¶¶22-24.) As the PadMapper site currently operates,<sup>3</sup> after clicking on a map pin for an apartment listed on craigslist, the site displays the Summary Bubble, which displays the core factual information about that apartment (e.g., price, number of bedrooms and bathrooms, term), to the extent available, along with a link to the full text of the Listing at its original source. (Id. at ¶24.) To the extent an end user wishes to view the full text of the Listing, the user can click through—and view the Listing on the craigslist site—using the link listed in the Summary Bubble. (Id. at ¶¶24-25.) All of the information displayed in the Summary Bubble is strictly factual in nature, and it is the only information from craigslist Listings that PadMapper displays to PadMapper’s users. (See Id. at ¶24, 27.)

It is axiomatic that facts are not protectable under copyright law. 17 U.S.C. ¶ 102; Harper and Row Pubs., Inc. v. Nation Enterps., 471 U.S. 539, 547 (1985). Consequently, PadMapper’s extraction, use and display of this factual information in connection with the generation of its apartment search map and Summary Bubbles cannot form the basis of craigslist’s infringement claims. Furthermore, as discussed below, PadMapper’s use of this information is fundamentally transformative. The apartment search map and display of information in a Summary Bubble are part and parcel of search engine functionality offered by PadMapper.

## 2. PadMapper’s use of Listing text to enable its search engine functionality is fair use.

Apart from the apartment search map and Summary Bubbles, which are displayed to end users, PadMapper uses the text of the Listings to enable its search engine functionality and allow end users to map and compare among Listings between different (non-craigslist) Listings sources. (See DeMenthon Decl. at ¶ 17.) This use of factual information to facilitate search and comparison by end users is classic fair use.

The fair use doctrine “requires courts to avoid rigid application of the copyright statute

<sup>3</sup> As explained in section A.2 above, this functionality previously worked differently, utilizing an inline link. PadMapper’s use of inline linking is discussed below.

when, on occasion, it would stifle the very creativity which that law is designed to foster.”

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (citing Stewart v. Abend, 495 U.S. 207, 236, (1990)) (internal quotation marks and citation omitted). The Copyright Act establishes four factors relevant to the fair use analysis: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work. 17 U.S.C. § 107. The four factors are non-exclusive, and provide “general guidance”; they are to be explored and weighed together, “in light of the purposes of copyright.” Campbell, 510 U.S. at 578-579; accord Harper & Row, 471 U.S. at 560-61. “Where material facts are not in dispute, fair use is appropriately decided on summary judgment.” Mattel Inc. v. Walking Mt. Prods., 353 F.3d 792, 800 (9th Cir. 2003) (citing Harper & Row, 471 U.S. at 560); accord Leadsinger, Inc. v. BMG Music Publ’g, 512 F.3d 522, 530 (9th Cir. 2008) (“well established that a court can resolve the issue of fair use on a motion for summary judgment”).

*a. Purpose and Character of the Use*

The first fair use factor considers the purpose and character of the use. This inquiry focuses on whether and to what extent the challenged work is “transformative.” Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 720 (9th Cir. 2007) (quoting Campbell, 510 U.S. at 579). A work is “transformative” when it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” Campbell, 510 U.S. at 579. Numerous cases, including two from the Ninth Circuit, establish that use of materials to enable search engine functionality is transformative and fair use. In Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003), the defendant, Arriba, operated an Internet search engine that allowed for the search and display of images. Arriba copied, stored and displayed small, “thumbnail” versions of images appearing on various websites, and displayed those thumbnail images in response to search queries. In response to Kelly’s claim of copyright infringement, Arriba asserted a defense of fair use. Kelly argued that because Arriba did not add any commentary or other expression to the images, Arriba’s use was not transformative. The Ninth Circuit disagreed, holding that “Arriba’s use of the images serves a different function than Kelly’s use—improving access to information on the internet versus

1 artistic expression.” *Id.* at 819. “Arriba’s search engine functions as a tool to *help index and*  
 2 *improve access to* images on the internet and their related web sites.” *Id.* at 818 (emphasis added).

3 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007), which adopted the  
 4 Kelly analysis, affirmed that search engine functionality is transformative. There, the Ninth Circuit  
 5 upheld the inclusion of thumbnail images in search results because “[a]lthough an image may have  
 6 been created originally to serve an entertainment, aesthetic, or informative function, a search engine  
 7 transforms the image into a pointer directing a user to a source of information.” *Id.* at 1165. Citing  
 8 Campbell, the court observed that “a search engine may be more transformative than a parody  
 9 because a search engine provides an entirely new use for the original work, while a parody typically  
 10 has the same entertainment purpose as the original work.” *Id.* “In other words, a search engine puts  
 11 images in a different context so that they are transformed into a new creation.” *Id.* (internal  
 12 quotation marks omitted).

13 One recent decision cited Perfect 10 and Kelly favorably in concluding that Google’s book  
 14 scanning project was fair use because it “helps readers, scholars, researchers, and others find  
 15 books.” Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 291 (S.D.N.Y. 2013). White v.  
 16 West Publ’g Corp. is also similar factually, and instructive, on the issue of transformative use. In  
 17 that case, defendants used and manipulated the information in the legal briefs to make the briefs  
 18 easier to locate, and to enable more efficient use of the information contained in the briefs. See  
 19 generally, West Publ’g Corp., 12 Civ. 1340 (JSR), 2014 U.S. Dist. LEXIS 92482, \*4-5 (S.D.N.Y.  
 20 July 3, 2014) (describing defendants’ use and manipulation of the information and the purposes for  
 21 doing so). The court held that defendants’ acts of “reviewing, selecting, converting, coding, linking,  
 22 and identifying the documents” added “something new, with a further purpose or different  
 23 character” than the original briefs. *Id.* at 7 (citing Campbell, 510 U.S. at 579). See also Fox News  
 24 Network, LLC v. TVEyes, Inc., 2014 U.S. Dist. LEXIS 126138, \*31 (S.D.N.Y. Sept. 9, 2014)  
 25 (“TVEyes’ search engine together with its display of result clips is transformative”).

- 26 i. PadMapper’s use of the Listings to provide search engine  
 27 functionality is transformative.

28 PadMapper uses the data from the Listings for essentially the same purpose as the



1 defendants in the above cases: to enable its search engine functionality. In all of these cases, the use  
2 and manipulation of data to enable index and search functions and provide additional functionality  
3 to consumers for making use of the information contained in the original works was found to be fair  
4 use. PadMapper extracts Listing Data from the HTML to create an index of information and to  
5 allow users to locate apartments that meet their needs. PadMapper allows users to search among  
6 Listings, view summaries of those Listings, more easily eliminate from consideration Listings for  
7 unsuitable apartments, and click through to the craigslist site to view actual Listings for apartments  
8 which may meet their needs. The actual text of a Listing containing the keyword is not displayed  
9 (see DeMenthon Decl. at ¶ 17), a user would need to click on the provided hyperlinks to navigate to  
10 the actual Listing on the craigslist website. This is classic search engine functionality which the  
11 courts in both Kelly and Perfect 10 found to be transformative and fair use. PadMapper's display of  
12 summaries of the Listings—the minimum and key factual information necessary for end users to  
13 make a decision regarding a Listing—in a spatially mapped format is equally, if not more  
14 transformative than the search engines in Kelly and Perfect 10. Indeed, PadMapper is more than just  
15 a search engine because it incorporates additional data (developed both by PadMapper itself and  
16 third parties) in order to aid in the end user's decision-making process. As numerous end users have  
17 expressed emphatically, this functionality does not make PadMapper a replacement for craigslist.  
18 (Balasubramani Decl. at ¶ 3, Ex. A.) Rather, it functions as a search engine and comparison tool  
19 that allows users to make more informed choices about housing and more effective use of the  
20 Listings from craigslist.

21 PadMapper does not just enable a user to locate a potentially suitable apartment Listing  
22 through use of its search engine, it provides summaries of the most important information from  
23 Listings, helps users understand the information they seek, and adds additional information. In  
24 short, Padmapper “has created a different purpose for the [Listings]”—this is “an entirely new use”  
25 of the data—the Listing Data is used “in a different context,” and as “a pointer directing a user to a  
26 source of information.” See Perfect 10, 508 F.3d at 1165. As such, it comfortably falls within the  
27 bounds of fair use.  
28



1                   ii.       The fact that PadMapper is a commercial entity is of little value in  
2                   determining fair use.

3                   While PadMapper is a for-profit organization, this does not materially tip the scales against  
4                   it. Fair use has been found even where a defendant benefitted commercially from the unlicensed use  
5                   of copyrighted works. See, e.g., American Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d  
6                   Cir. 1994) (“[C]ourts will not sustain a claimed defense of fair use ... when the copier directly and  
7                   exclusively acquires conspicuous financial rewards from its use of the copyrighted material ...  
8                   courts are more willing to find a secondary use fair when it produces a value that benefits the  
9                   broader public interest.”); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612  
10                  (2nd Cir. 2006). Where there is a strong transformative nature to the use, a court “must weigh  
11                  [defendant’s] superseding and commercial uses of [the copyrighted works] against the [defendant’s]  
12                  significant transformative use, as well as the extent to which [defendant’s use] promotes the  
13                  purposes of copyright and serves the interests of the public.” Perfect 10, 508 F.3d at 1166. Here,  
14                  PadMapper does not charge users for access to its website or the search engine functionality. Nor is  
15                  a user charged for access to the original Listings. PadMapper does not run display ads on the  
16                  PadMapper site. Given the highly transformative nature of PadMapper’s search engine and  
17                  comparison tool, and the benefits it provides to the public, PadMapper’s use “is more significant  
18                  than any incidental superseding use of the minor commercial aspects of [PadMapper’s] search  
19                  engine and website.” Perfect 10, 508 F.3d at 1167.

20                               *b.       Nature of the Copyrighted Work*

21                  The second fair use factor looks to “the nature of the copyrighted work.” 17 U.S.C. §  
22                  107(2). This factor recognizes that “some works are closer to the core of intended copyright  
23                  protection than others,” so that the fair use analysis may differ across different works. Campbell,  
24                  510 U.S. at 586. Fair use is “more likely to be found in factual works than in fictional works.”  
25                  Stewart v. Abend, 495 U.S. 207, 237 (1990). This is not unexpected, given that facts are not  
26                  protected by copyright law. See Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991)  
27                  (“[Facts] may not be copyrighted and are part of the public domain available to every person.”)  
28                  (internal citation omitted).

                  Notably, the Listings, or at least their most useful elements, are predominantly factual,

published and made available to the general public free of charge. While craigslist listings in other categories may on occasion contain creative content, the Listings here concern factual details regarding rental properties (e.g., address, square footage, proximity to transportation) and the price at which such property is offered. While the Listings may contain photos (supplied by users), PadMapper does not reproduce or display such photos. (See section C.3, below.) The primarily factual nature of the Listings weighs in favor of a finding of fair use.

*c. Amount and Substantiality of the Work Used*

The third factor examines whether the amount copied “[is] reasonable in relation to the purpose of the copying.” Campbell, 510 U.S. at 586. “[T]he extent of permissible copying varies with the purpose and character of the use.” Id. at 586-87. PadMapper must index and use the location data from Listings in order to place pins on maps with sufficient accuracy to benefit users, and to provide additional information beneficial to users, such as walkability scores. Similarly, it must use rental amount information in order to enhance searching, and to provide analysis such as the comparisons of rental amounts to the median for similar apartments. The display of information within Summary Bubbles (or the previously used “PadMapper Bar”), in connection with its map feature, allows a user to very quickly evaluate the relative qualities of a potential rental spaces. To abstain from use of certain information contained in Listings would reduce the usefulness of PadMapper’s search engine to the browsing public. (See DeMenthon Decl. at ¶ 17.)

Nor does PadMapper’s back-end use of the entirety of the Listing Data undermine PadMapper’s fair use argument. Numerous courts have held that copying the entirety of a work may be fair use where that copying is necessary to the purpose of the (fair) use. Perfect 10, 508 F.3d at 1167; Kelly, 336 F.3d at 821; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984). In Kelly, the Ninth Circuit explained that:

although Arriba did copy each of Kelly’s images as a whole, it was reasonable to do so in light of Arriba’s use of the images. It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site. If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine.

Id. at 821. Several recent decisions have recognized that using the entirety of the work does not

1 automatically undermine fair use, where the work is used to enable search engine functionality. See,  
 2 e.g., Authors Guild, 954 F. Supp. 2d at 292. West Publ’g Corp., 2014 U.S. Dist. LEXIS at \* 9. The  
 3 West Publ’g Corp. case is instructive. There, a plaintiff (lawyer) sued the owners of the Westlaw  
 4 and Lexis databases based on their copying of legal briefs he had authored and the subsequent use  
 5 and display of the text of the briefs through their websites. Id. at 2-3. The defendants asserted the  
 6 defense of fair use, and in support thereof, demonstrated that the copying of the full text of the  
 7 briefs was necessary in order to enable them to provide an interactive search tool. Id. at 6-7. The  
 8 court found this fact persuasive. “Although defendants here copied the entirety of White’s briefs,  
 9 such copying was necessary to make the briefs comprehensively text searchable. Thus the Court  
 10 finds that defendants only copied what was reasonably necessary for their transformative use.” Id.  
 11 at 9. The court arrived at a similar result in the Authors Guild case, where it found that Google’s  
 12 scanning of the entirety of the works in question was necessary to facilitate its search engine  
 13 functionality. Authors Guild, Inc., 954 F. Supp. 2d at 292 (“Here, as one of the keys to Google  
 14 Books is its offering of full-text search of books, full-work reproduction is critical to the  
 15 functioning of Google Books.”).

16 As was the case with the defendants in Authors Guild and West Publ’g Corp., PadMapper  
 17 stores the full text of Listings so that it can provide effective (and enhanced) search capabilities for  
 18 users. Storing less than the entire text from each Listing would cause a search to miss some relevant  
 19 Listings and would reduce the quality and value of each search to consumers. (DeMenthon Decl. at  
 20 ¶ 17.) Moreover, at every step in the process, PadMapper only displays the limited amount of  
 21 information necessary to allow the consumer to make an informed comparison regarding a  
 22 particular Listing. Notably, PadMapper does not reproduce the Listings en masse, and in this  
 23 respect, it is similar to the defendants in Kelly and Authors Guild.<sup>4</sup> While PadMapper does use the  
 24 full text of Listings from the HTML, this is done on the back-end, and merely to facilitate its  
 25 various transformative (search engine) uses. As further set forth above, numerous courts have found  
 26

27  
 28 <sup>4</sup> The court in Authors Guild noted the importance of limiting the actual display of the text from the  
 source work. 954 F. Supp. 2d at 292 (“Significantly, Google limits the amount of text it displays in  
 response to a search.”).

1 this type of use to be fair use.

2 *d. Effect on the Potential Market for or Value of the Work*

3 The fourth factor examines whether the use damages the copyright owner by harming the  
4 potential market for or the value of the work. Campbell, 510 U.S. at 590. Cases such as this one,  
5 where the public receives a significant benefit from the use but owners will receive no gain if the  
6 use is denied, present the most compelling case for the role that fair use plays in advancing the  
7 public purpose of the copyright laws. That is because “a use that has no demonstrable effect upon  
8 the potential market for, or the value of, the copyrighted work need not be prohibited in order to  
9 protect the author’s incentive to create.” Sony Corp. of Am. v. Universal City Studios, Inc., 464  
10 U.S. 417, 450 (1984).

11 Here, there is no harm to the market for or value of the Listings or of craigslist’s service  
12 generally. PadMapper’s storage of the Listing text and use of the Listing Data to create visual  
13 displays enables its search engine to be effective. Notably, craigslist has produced *no* evidence that  
14 PadMapper’s transformational use of data underlying the Listings diminishes their value. To the  
15 contrary, numerous emails from end users attest to the fact that PadMapper serves as a complement  
16 to, and not a substitute for, craigslist. Many such users specifically noted that were it not for  
17 PadMapper’s search engine, they would have ceased using craigslist to locate an apartment.  
18 (Balasubramani Decl. at ¶ 3, Ex. A.) It stands to reason that PadMapper’s search and indexing of  
19 Listings does not harm craigslist, as the effectiveness of an advertisement is only enhanced by  
20 increasing its distribution and exposure. Indeed, PadMapper’s display and analysis of the Listings  
21 makes it easier for apartment renters to use craigslist’s data and thereby enhances their value. As a  
22 result, this factor strongly supports a finding of fair use.

23 3. PadMapper’s previous inline linking of Listings from craigslist is not infringing  
24 under the “server test” used by the Ninth Circuit.

25 PadMapper’s search results for Listings previously utilized inline linking in conjunction  
26 with a PadMapper Bar. When a user found a particular Listing that the user wished to obtain more  
27 information about, she could click on the pin representing the Listing, and this caused the user’s  
28 browser to load the original craigslist source page for the Listing alongside the PadMapper Bar. The

1 PadMapper Bar, displayed within the browser window on the left-hand side, contained the rental  
 2 price, number of bedrooms, number bathrooms (if available), an indication of how the rental price  
 3 compared to the median price of similar apartments in the same area (e.g., “20% more than nearby  
 4 2 BR”), and a phone number for the lister (if available). (DeMenthon Decl. at ¶ 31.) Additionally,  
 5 the PadMapper Bar allowed the user to save the apartment as a favorite, hide the apartment from the  
 6 map, and enter notes regarding a Listing. (*Id.*) It also contained links to allow the user to view the  
 7 apartment on the map and to navigate to the original Listing on the craigslist website. The  
 8 PadMapper Bar was similar to the Summary Bubble now used by PadMapper. (*Id.*)

9 Under the “server test” employed by the Ninth Circuit, PadMapper’s inline linking of a  
 10 Listing from craigslist’s website does not constitute a violation of any exclusive rights craigslist  
 11 may enjoy as a copyright owner. Indeed, it is no different than the end user viewing the Listing in  
 12 question on craigslist’s website, albeit through a browser window that contains the user’s own  
 13 annotations. In Perfect 10, the Ninth Circuit held that in-line linking of images “does not constitute  
 14 direct infringement of the copyright owner’s display rights.” 508 F.3d at 1161. The court described  
 15 such images as being displayed by “HTML instructions that direct a user’s browser to a website  
 16 publisher’s computer that stores the full-size photographic image.” *Id.* at 1161. Thus, because a  
 17 defendant “does not store the photographic images on its computer, the defendant would not have a  
 18 ‘copy’ of the images as that term is used in the Copyright Act.” *Id.* at 1160. Other cases are in  
 19 accord with this approach. See Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC, No. 13 C  
 20 4664, 2014 U.S. Dist. LEXIS 92809, \*13-18 (N.D. Ill. July 8, 2014) (holding that where plaintiff  
 21 failed to produce evidence that plaintiff’s content was ever contained on defendant’s servers,  
 22 defendant did not copy the content and cannot be liable under the Copyright Act); see also Flava  
 23 Works, Inc. v. Gunter, 689 F.3d 754, 761-762 (7th Cir. 2012) (implicitly endorsing the server test).  
 24 Courts have also rejected the argument that display of the additional material (in this case, the  
 25 PadMapper Bar) along-side the inline linked Listing constitutes an unauthorized derivative work.  
 26 See U-Haul International, Inc. v. WhenU.com, Inc., 279 F. Supp. 2d 273 (E.D. Va. 2003)  
 27 (analogizing pop-up overlay to multiple windows open on an end user’s machine and declining to  
 28 find that pop-up ads or coupons constitute the creation of an unauthorized derivative work (of the

1 website owner)); Wells Fargo & Co., et al. v. WhenU.com, Inc., 293 F. Supp. 2d 734, 771 (E.D.  
 2 Mich. 2003) (same); but see Futuredontics Inc. v. Applied Anagramics Inc., 1998 U.S. Dist. LEXIS  
 3 2265; 45 U.S.P.Q.2D (BNA) 2005 (C.D. Cal.; Jan. 30, 1998) (declining to grant motion to dismiss  
 4 and noting lack of clear authority as to whether a “frame[d] page constitutes a derivative work”). In  
 5 sum, there is no claim of direct infringement based on in-line linking.

6 However, even assuming that the inline-linking of a craigslist web page alongside the  
 7 PadMapper Bar constituted a “display,” or otherwise infringed on one of the exclusive rights of the  
 8 copyright owner, such display also constitutes fair use. PadMapper allows the end user to pull up a  
 9 particular Listing which can be viewed alongside the search map, but also provides the PadMapper  
 10 Bar—which contained summary factual information and functionality that could be used by the end  
 11 user to manage their search of Listings—alongside it. For example, clicking on “Favorite” within  
 12 the PadMapper Bar would highlight the pin for a Listing, thereby keeping the Listing readily  
 13 apparent for further consideration at a later time. Clicking on “Hide from Map” would remove the  
 14 Listing’s pin from the map, thereby preventing the user from wasting time reviewing Listings  
 15 previously determined to be unsuitable. (DeMenthon Decl. at ¶ 31.) Users could also use  
 16 functionality in the PadMapper Bar to make notes regarding a particular Listing. This use of Listing  
 17 information—display of a Listing alongside tools to manage prospective Listings—is also fair use  
 18 under Campbell. The use is also transformative. While the entirety of the work is displayed, the  
 19 manner of the display (framing) tips this factor in PadMapper’s favor. Finally, and perhaps most  
 20 importantly, as discussed above, PadMapper’s inline linking of the Listings pages directly from the  
 21 craigslist site did not cause any harm to craigslist. As suggested by the responses of users in emails  
 22 to craigslist, PadMapper facilitated and increased the use of craigslist by end users. PadMapper did  
 23 not derive any economic benefit through its use of inline linking. (It continues to display listings  
 24 from third parties other than craigslist via inline links and has not received any complaints about  
 25 this practice. (DeMenthon Decl. at ¶ 32).) Arguably, if PadMapper were displaying banner  
 26 advertising in the PadMapper Bar, or using the bar as a way to display competitive listings from  
 27 third parties, these types of acts *might* tip the fair use scales in craigslist’s favor, but PadMapper is  
 28 doing the opposite. Cf. Futuredontics, Inc. v. Applied Anagramics, 1997 U.S. Dist. LEXIS 22249

(C.D. Cal. Nov. 24, 1997) (declining to grant preliminary injunction because plaintiff copyright owner presented no evidence of harm from allowing end users to load a page and display plaintiff's web page in a frame).

4. PadMapper's extraction or receipt of the Listing Data did not infringe on any of craigslist's rights in the Compilation.

PadMapper currently obtains Listing Data from the HTML via 3Taps API, and it previously obtained identical Listing Data directly via craigslist's website. In both instances, it obtains the publicly visible, displayed version of the Listings which can be accessed by any visitor to craigslist's website, including standard search engines such as Google. Neither extraction by PadMapper of the Listing Data from the HTML nor receipt of this HTML from the 3Taps API is infringing. craigslist does not claim ownership in this basic HTML; nor could it, given its commonplace and entirely obvious nature. (DeMenthon Decl. at ¶ 11.) HTML is not covered by the application to register the Database Compilation. (See Kao Decl. in Support of Opp'n to MTD, Ex. F1 (Dkt. 60-14) at 28 (craigslist application for copyright registration of "Group registration for automated database titled "craigslist Classified Ads Database; published updates from April 19, 2012 to July 19, 2012").) In any event, even assuming craigslist somehow asserts some legally recognizable ownership in these snippets of HTML that cause Listings to be displayed to end users, PadMapper's limited duplication of such code in order to extract the underlying facts does not violate craigslist's copyrights. Even where entire copies of a copyrightable compilation are made, so long as the purpose is a permitted use of the extracted factual data, this intermediate copying is not infringement. See Ticketmaster Corp. v. Tickets.com, Inc., CV99-7654-HLH (VBKx), 2003 U.S. Dist. LEXIS 6483, \*16 (C.D. Cal. March 7, 2003) ("Taking the temporary copy of the electronic information for the limited purpose of extracting unprotected public facts leads to the conclusion that the temporary use of the electronic signals was 'fair use' and not actionable."); Nautical Solutions Mktg. v. Boats.com, 8:02-cv-760-T-23TGW, 2004 U.S. Dist. LEXIS 6304, \*7-8 (M.D. Fla. Apr. 1, 2004) ("Boat Rover's momentary copying of Yachtworld's public web pages in order to extract from yacht listings facts unprotected by copyright law constitutes a fair use and thus is not an infringement of copyright."); see also Assessment Techs. of WI, LLC v. WIREdata, Inc.,



350 F.3d 640, 645 (7th Cir. 2003) (noting that if non-copyrightable material was so entangled with a software program that to extract the data would also require copying the program, then defendant “would be privileged to make such a copy”); Sega Enters. v. Accolade, Inc., 977 F.2d 1510, 1520-28 (9th Cir. 1992) (“intermediate copying” of the operating system was a fair use, since the only effect of enjoining it would be to give [plaintiff] control over non-infringing products).

**D. craigslist’s Compilation Lacks the Requisite Creativity, and PadMapper Does not Infringe on Whatever Slim Protection craigslist May Have**

A compilation “is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C. § 101. “The mere fact that a work is copyrighted does not mean that every element of the work may be protected.” Feist, 499 U.S. at 348. As the Court recognized in its April 29, 2013 Order, copyright protection in a compilation “extends only to the material contributed by the author of [the compilation], as distinguished from the preexisting material employed in the [compilation].” (Order on MTD (Dkt. 74) 10:14-17) (citing 17 U.S.C. § 103(b)).<sup>5</sup> The *selection and arrangement* of preexisting material may constitute a contribution to a compilation that is protectable if such selection and arrangement is sufficiently original. Feist, 499 U.S. at 348. For the selection or arrangement of the elements of the compilation to be creative, the author must make “non-obvious choices from among more than a few options.” Matthew Bender & Co. v. West Publ’g Co., 158 F.3d 674, 683 (2d Cir. 1998). Copyright protection in a compilation does not extend to the idea or concept of compiling a particular type of data (such as available rental listings), nor does it extend to a process, system, or method of selecting and arranging data. See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery ...”); Mazer v. Stein, 347 U.S. 201, 217-18 (1954) (holding that copyright extends only to an expression of an idea).

<sup>5</sup> In its Database Application craigslist did not designate those works that were contributed by others (i.e., those Listings that are outside the exclusivity window found in the Court’s April 29, 2013 Order).



1 Examined closely, it is apparent that craigslist (1) does not have a protectable copyright  
 2 interest in the selection and arrangement of the Listings,<sup>6</sup> and (2) to the extent craigslist may enjoy  
 3 some minimal copyright protection in its selection and arrangement, PadMapper has not copied  
 4 this.

5 1. craigslist does not have a protectable copyright interest in the selection of Listings  
 6 within the Compilation.

7 To warrant protection in selection underlying pre-existing materials, such selection must be  
 8 sufficiently original or creative. Selection entails “the exercise of judgment in choosing which facts  
 9 from a given body of data to include in a compilation.” Key Publications, Inc., 945 F.2d at 519  
 10 (citing William Patry, Copyright in Compilations of Facts (or Why the “White Pages” are not  
 11 Copyrightable), 12 COMMERCE & LAW 37, 64 (Dec. 1990)). The required creativity and originality  
 12 has been found, for example, where the compiler selected items of interest to a particular  
 13 community out of a larger set of possible items to include, using the compiler’s judgement. See Key  
 14 Publications, 945 F.2d at 513 (finding the selection of businesses for inclusion in a Chinese-  
 15 American telephone directory based on whether the compiler believed that the businesses would be  
 16 of interest to Chinese-American community sufficiently original). Courts have also found sufficient  
 17 creativity and originality where the compiler made a selection based on the perceived value of a  
 18 certain subset of data. See Eckes v. Card Prices Update, 736 F.2d 859, 862-63 (2d Cir. 1984)  
 19 (finding the selection of limited number of “premium” baseball cards out of larger set of all baseball  
 20 cards deserving of copyright protection). In contrast, courts have found a lack of sufficient  
 21 originality and creativity where the putative author attempts to include all of the available data  
 22 within a particular set. Schoolhouse, Inc. v. Anderson, 275 F.3d 726, 730 (8th Cir. 2002) (“For  
 23

24 \_\_\_\_\_  
 25 <sup>6</sup> Given the absence of a certificate of registration for the Database Application, craigslist does not  
 26 enjoy a presumption of validity as to its copyright. CHM Indus., Inc. v. Structural & Steel Prods.,  
 27 Inc., 4:08-CV-454-Y, 2008 U.S. Dist. LEXIS 86131(N.D. Tex. Oct. 24, 2008) (“presumption ...  
 28 arises not as a result of effective registration, but ... because of the plaintiff’s possession of a  
 certificate of registration”); Cosmetic Ideas, Inc. v. IAC/InteractiveCorp, 606 F.3d 612, 621, n.14  
 (9th Cir. 2010) (“In fact, a defendant is in some ways aided by a plaintiff’s lack of a certificate,  
 because if a party proceeds to litigation without a registration certificate, it bears a greater  
 evidentiary burden of proving the validity of its copyright.”).

purposes of compiling such a table [listing sports available in public schools], there is nothing original about simply selecting all of the generally available sports.”); Warren Pub., Inc. v. Microdos Data Corp., 115 F.3d 1509, 1518 (11th Cir. 1997) (holding plaintiff “did not exercise any creativity or judgment in selecting cable systems to include in its Factbook, but rather included the entire relevant universe known to it”). Similarly, a compiler who merely publishes what is provided to it does not engage in any “selection,” and therefore lacks a protectable copyright interest in the resulting compilation. See Want Ad Digest, Inc. v. Display Adver., Inc., 653 F. Supp. 2d 171, 179 (N.D.N.Y. 2009) (“Want Ad ... does not exercise any judgment in deciding which classifieds to include in the *Want Ad Digest*. Rather, Want Ad merely publishes the classified advertisements its clients submit to it.”). Obviousness is an additional limitation on creativity in selection. Feist, 499 U.S. at 363. Finally, the use of a system may not serve as the copyrightable basis for selection. See Warren Pub., Inc. v. Microdos Data Corp., 115 F.3d 1509, 1517 (11th Cir. 1997) (noting that if the compiler did in fact use a “system” to select what “communities to include in its directory,” such selection would not be entitled to copyright protection).

*a. No Initial Creative “selection” of Listings*

The material facts of how craigslist generates its database of Listings are not in question. craigslist’s users submit apartment listings using craigslist’s online system. While these submissions may be subject to some filtering (which as discussed below does not bear on the creativity of the database), they are published to the website under the category and geographic area selected by the user. (FAC ¶¶ 30, 31; DeMenthon Decl. ¶ 37, Ex. K.) craigslist itself has no involvement (in the copyright sense) in the selection of what Listings users decide to post to the website.

In this way, craigslist is different from the plaintiff in Key Publications, who surveyed the landscape of businesses in certain areas and made a subjective judgement as to which of those businesses would be of interest to the Chinese-American community, Key Publications, 945 F.2d at 511, or the plaintiff in Eckes v. Card Prices Update, who decided which baseball cards should be included in his guide as “premium” cards. Eckes v. Card Prices Update, 736 F.2d at 863. Rather, as was the case in Want Ad Digest, craigslist “does not exercise any judgment in deciding which

classifieds to include,” it “merely publishes the classified advertisements its clients submit to it.”  
Want Ad Digest, 653 F. Supp. 2d at 179.<sup>7</sup>

*b. A System for Restricting Content is Not an Exercise of Judgment*

Despite that user posts are not initially selected by craigslist, it has asserted that the Compilation should be afforded copyright protection on the basis it “has the right to, and does, take voluntary efforts to restrict the posting of offensive or otherwise objectionable content on its website” (Pl. Opp’n to Defs. MTD (Dkt. 60) at 17:16-17.) In support of this position, craigslist argues that in Metro. Reg’l Info. Sys. v. Am. Home Realty Network, Inc., 888 F. Supp. 2d 691, 710 (D. Md. 2012), the court found that plaintiff had demonstrated original selection and arrangement warranting copyright protection “based on MRIS’s active efforts to ‘oversee [] and control [] the quality and accuracy of the content in the MRIS Database.’” (Pl. Opp’n to Defs. MTD (Dkt. 60) at 19:2-3.) craigslist’s reliance on Metro. Reg’l Info. Sys. is misplaced. In addition to clarifying its holding to exclude copyrightability of the textual elements of the compilation in a later ruling, that case is distinguishable. Metro. Reg’l Info. Sys., 904 F. Supp. 2d 530, 534-35 (D. Md. 2012).

In contrast to the actions of the plaintiff in Metro. Reg’l Info. Sys., craigslist’s alleged curatorial efforts are not related to the quality or accuracy of the *Listings as rentals*. In Metro Reg’s Info Sys., plaintiff, MRIS, sent notices to posters in order to maintain the “quality and accuracy” of the listings, “including [notifying them of their] failure to update the status of a property or the manipulation of information in property listings.” Metro. Reg’l Info. Sys., 888 F. Supp. 2d at 710.

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<sup>7</sup> craigslist’s position that it exerts sufficient curatorial efforts is at odds with the position it takes in cases involving its own liability for user generated content. In such cases, craigslist is quick to disclaim responsibility for the selection of listings that appears on its website, instead portraying itself as a passive conduit for its users’ postings. See Chi. Lawyers’ Comm. for Civ. Rights Under Law, Inc. v. craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008) (holding that craigslist was not liable for housing discrimination in the listing, and accepting craigslist’s argument that “[e]very month more than 30 million notices are posted to the craigslist system. Fewer than 30 people, all based in California, operate the system, which offers classifieds and forums for 450 cities. It would be necessary to increase that staff ... substantially to conduct the sort of editorial review that the Lawyers’ Committee demands--and even then errors would be frequent.”); Dart v. craigslist, Inc., 665 F. Supp. 2d 961, 970-976 (N.D. Ill. 2009) (finding craigslist not liable for any posting regarding prostitution, as craigslist did not cause the posting to be made). It is hard to square craigslist’s position in intermediary liability cases with its argument here that it exercises sufficient curatorial control over the selection of content to justify copyright protection.

1 craigslist on the other hand merely filters out (using an algorithm) scam postings that are or relies  
 2 on its users to flag (and then deletes) postings that do not comport with its Terms of Use.  
 3 (DeMenthon Decl. ¶ 40, Ex. N.) (“Postings may also be flagged for removal by CL staff or CL  
 4 automated systems.”) The manner in which this preemptive filtering is performed, for example, as  
 5 an upfront programmed screen that filters user posts for spam and scams or offensive content is  
 6 immaterial, as such screening is more analogous to “collection effort” than true selectivity  
 7 judgment. BellSouth, 999 F.2d at 1441 (“[T]he Copyright Act does not protect ‘industrious  
 8 collection,’ it affords no shelter to the resourceful, efficient, or creative collector.”). Such filtering  
 9 efforts are also system-based and thus not protectable. See Warren Pub., Inc. v. Microdos Data  
 10 Corp., 115 F.3d 1509, 1517 (11th Cir. 1997) (system-based selection is not entitled to copyright  
 11 protection); 11 U.S.C §102(b). As to removing posts that violate craigslist’s Terms of Use,  
 12 craigslist merely deletes posts flagged by users, and any selection is performed by its users (i.e.,  
 13 craigslist’s users flag content they believe to be inappropriate). (DeMenthon Decl. ¶ 40, Ex. N (“CL  
 14 users flag postings they believe are inappropriate by clicking the “prohibited” link near the top of  
 15 each posting.”).) These efforts cannot be attributed to craigslist for authorship purposes. Warren  
 16 Publ., 115 F.3d at 1519 (“the selection is not its own, but rather of the cable operators”); BellSouth,  
 17 999 F.2d at 1443 (rejecting copyright in heading structure of directory in part on the basis that the  
 18 subscribers were the ones who selected from the alternative headings offered for listing).

19 Any database requires efforts to maintain, but the type of selective judgment recognized by  
 20 copyright law must be based on judgment related to the nature of the content on the basis of the  
 21 purpose for which it is selected for inclusion. If not, particularly with respect to a user-generated  
 22 collection of data, any minimum efforts to maintain even the most base standards for excluding  
 23 improper submissions could be transformed into the “exercise of creative judgment” over whether  
 24 the content should be included in a compilation. craigslist’s implementation of a system for the  
 25 removal of Listings based on automated filtering for scams or duplicate posts, or user-flagged  
 26 deficiencies unrelated to the qualities of the Listings as a rental is not an exercise of judgment as to  
 27 which apartments are “good” apartments or of interest to a certain community.  
 28

c. *Default Expiration Dates are Not Curatorial*

craigslist has also asserted that it's selection of Listings exhibits sufficient originality and creativity because craigslist "choos[es] the duration that postings appear on its website" depending on the type of ad and geographic area in which it is included. (Pl. Opp'n to Defs. MTD (Dkt. 60) at 17:19-24.) Currently, craigslist employs two expiration dates for "Housing" posts, of seven days for posting in a number of "List A Cities" and 45 days in all other cities and areas. (See DeMenthon Decl., ¶ 40, Ex. M.) However, similar to any other natural boundary on a set of data, an expiration date is a commonplace and inherent part of any classified listing. BellSouth, 999 F.2d at 1441 (reversing district court's finding of sufficient selection creativity, stating "any collection of facts ... will by necessity have a closing date and, where, applicable, a geographic limit selected by the compiler.").

In Warren Pub., Inc. v. Microdos Data Corp., the compiler argued that it had a "unique method of choosing which communities to include in its directory" 115 F.3d at 1517. The court found that this was not a sufficient exercise of selection, creativity or judgment, as the intention was to include all known cable systems. Id. at 1519. Instead, the court held that the only discretion the compiler used was not including certain information multiple times in order to make the directory "commercially useful," Id. at 1518, which the court held was not entitled to protection. Id. at 1519. craigslist's removal of Listings after a certain duration is similar to the plaintiff in Warren. An expiration date serves a simple "commercially useful" purpose in any list of classifieds; it is not an editorial expression of the compiler. To find otherwise would result in any classified ad database being entitled to copyright protection simply on the basis that old posts are removed at some set time determined by the compiler. The implementation of an expiration date for a classified listing "lacks the quantum of originality needed to merit copyright protection." Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003) (finding commonplace selection of elements of glass sculpture and typical of jellyfish insufficient for copyright protection); see also United States v. Hamilton, 583 F.2d 448, 452 (9th Cir. 1978) (holding that "trivial elements" of selection or arrangement are not copyrightable).

1           2.       craigslist does not exert sufficient creativity in its arrangement of Listings.  
 2 craigslist also asserts, pointing to the global organizational structure of its entire website, that the  
 3 arrangement of classified ads is sufficiently creative to warrant copyright protection:  
 4 craigslist’s website arranges its posting first into hundreds of geographic communities (for example,  
 5 the ‘SF Bay’, ‘Inland Empire,’ ‘Gold County’ in California), and then into dozens of different  
 6 categories and sub-categories, all of which are specifically named or chosen by craigslist.  
 7 (Pl. Opp’n to Defs. MTD (Dkt. No. 60) at 18:2-5.)

8           As an initial matter, craigslist is not responsible for deciding where particular Listings are  
 9 included within its geographic and topical categories. *craigslist’s users* make that determination.  
 10 (See craigslist’s FAQ <<http://www.craigslist.org/about/help/faq#freePosting>>, exhorting users to  
 11 “choose just ONE local craigslist site for which your ad is most relevant—generally the site closest  
 12 to you” (DeMenthon Decl. ¶ 37, Ex. K.) craigslist has simply implemented a system whereby any  
 13 user can submit a Listing and select the topic and geographic area in which her Listing will be  
 14 categorized. Thus, the critical act of judgment on the part of the compiler (here craigslist) is  
 15 missing. Warren Publishing, 115 F.3d at 11519 (rejecting claim of originality in selection because  
 16 the selection “is not its own, but rather that of the cable operators); BellSouth Advertising & Publ’g  
 17 Corp. v. Donnelley Information Publ’g, Inc., 999 F.2d 1436, 1445 (11th Cir. 1993) (en banc)  
 18 (same). BellSouth is closely on point. There, the court rejected a claim of arrangement based on  
 19 headings in a classified directory, noting that:

20           the ultimate appearance of a particular subscriber under a certain heading is  
 21 determined by the subscriber’s willingness to purchase those listings in  
 22 [plaintiff’s] directory, While [plaintiff] may select the headings that are *offered* to  
 23 the subscriber, it is the *subscriber* who *selects* from those alternatives the  
 24 headings under which the subscriber will appear in the copyrighted directory.  
 25 BellSouth, 999 F.2d at 1444 (emphasis in original). As in Warren Publishing and BellSouth, where  
 26 the arrangement of “principal communities” were made by cable operators and subscribers,  
 27 respectively, here, the arrangement of listings within categories is made by end users, and not  
 28 craigslist. Thus, the arrangement of Listings under various headings lack “the originality required to  
 merit copyright protection.”

          Additionally, the headings themselves (the “geographic communities,” “categories” and

“sub-categories”) employed by craigslist to arrange its classified ads do not warrant protection, as they lack the originality required under copyright law. BellSouth, 999 F.2d at 1444 (holding that plaintiff’s directory categories such as “attorneys” and “banks” “represent such an obvious label for the entities appearing under these headings as to lack the requisite originality for copyright protection”); Want Ad Digest, Inc. v. Display Adver., Inc., 653 F. Supp. 2d at 179 (“Headings and subheadings such as ‘Animals,’ ‘Cars,’ and ‘Furniture’ are ‘entirely typical’ for a classified advertisement publication, and using such headings ‘is not only unoriginal, it is practically inevitable.’”) (quoting Feist, 499 U.S. at 362-63). With respect to the Listings themselves, there is one applicable category, titled “housing,” under which there are only a couple of relevant sub-categories with standard and obvious labels, *i.e.*, “apts/housing,” “rooms/shared,” “sublets/temporary,” and “vacation rentals.” (DeMenthon Decl. ¶ 35, Ex. H.) The compiler of a competing set of classified ads for housing would be pressed to find a material way to deviate from using these headings. *See BellSouth*, 999 F.2d at 1442 (finding that the existence of other possible arrangements is not sufficient).

3. Even assuming craigslist has some slim protectable copyright in the selection and arrangement of the Listings, PadMapper has not copied either of these elements.

The protection available for a database compilation is “thin.” Feist, 499 U.S. at 349. The standard test for copyright infringement is “substantial similarity.” Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000). However, “more similarity is required when less protectible matter is at issue. Thus, if substantial similarity is the normal measure required to demonstrate infringement, ‘supersubstantial’ similarity must pertain when dealing with ‘thin’ works.” 4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT, § 13.03[A] at 13-28 (1997); *see also* Jane C. Ginsburg, No “Sweat”? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone, 92 COLUM. L. REV. 338, 349 (1992) (“‘Even if the compilation is deemed original, what kind of copying will be held to infringe it?’ The answer [after Feist] appears to be: ‘Virtually none, short of extensive verbatim copying.’”). Phrased alternatively, “[t]he less copyright protection a work receives, the more similarity is required to meet the ‘substantial similarity’ standard.” Bensbargains.net, LLC v. XPbargains.com, Case No. 06cv1445



BTM, 2007 U.S. Dist. LEXIS 60544, \*11 (S.D. Cal. Aug. 16, 2007). Thus, infringement of compilations “consisting largely of uncopyrightable elements should not be found in the absence of ‘bodily appropriation of expression,’ or ‘unauthorized use of substantially the entire item.’” *Id.* (quoting *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 205 (9th Cir. 1989)); *see also BellSouth*, 999 F.2d at 1439 (applying *Feist* and concluding that defendant did not appropriate “original elements” of BellSouth directory “as a whole” by preparing data base and sales leads based upon listing information and units of advertising appearing in preexisting directory). The critical factor to analyzing infringement of a compilation is the “principles guiding [the] selection” of the compilation. *Key Publications*, 945 F.2d at 516. Citing this principle, courts have dismissed claims of infringement, despite an overlap of the underlying data. *See, e.g., Le Book Publishing, Inc. v. Black Book Photography, Inc.*, 418 F. Supp. 2d 305, 310 (S.D.N.Y. 2005) (holding that directories for “creative industries” were not infringing because of the lack of similar organizing principles); *Am. Massage Therapy Ass’n v. Maxwell Petersen Assocs.*, 209 F. Supp. 2d 941, 950 (N.D. Ill. 2002) (concluding that defendant did not infringe because the lack of similarity of the “principles guiding selection”); *TransWestern Publishing Co. v. Multimedia Marketing Associates*, 133 F.3d 773, 776 (10th Cir. 1998) (citing *Key Publications, Inc.* for the proposition that a “smaller competing publication” was not infringing because it “utilized significantly different principles of [listing] selection”).

*a. PadMapper Uses Wholly Independent Organizational Principles*

Under the extrinsic test for similarity, there is no infringement, because “no one would would mistake [PadMapper’s site] for that of [craigslist’s].” *TransWestern*, 133 F.3d at 776. Indeed, a “visual comparison” of the two compilations confirms that “there is no substantial similarity of arrangement between any of [craigslist’s] compilations and [PadMapper’s].” *Bensbargains.net, LLC v. XPbargains.com*, Case No. 06cv1445 BTM, 2007 U.S. Dist. LEXIS 60544, \*11-12 (S.D. Cal. Aug. 16, 2007).

Even if there was a sliver of creativity employed by craigslist through the exclusion of Listings and by allowing users to select among obvious choices for categorization of Listings, PadMapper does not merely incorporate the Listings that appear on craigslist. As PadMapper’s

1 apartment search map depends on having accurate locational data for the rental, PadMapper  
2 excludes from its collection of Listings any that do not have a mappable location. (DeMenthon  
3 Decl. at ¶ 13.) This results in between 40 and 60 percent of Listings not being used to generate a pin  
4 on the apartment search map. (*Id.*) PadMapper also compiles information about listings from  
5 variety of sources—craigslist is but one of nearly one hundred different sources of apartment  
6 listings indexed by PadMapper. (DeMenthon Decl. at ¶ 3.) Moreover, the approach to organizing  
7 the display of information for users of the websites is completely different. PadMapper does not  
8 utilize or reproduce craigslist’s “geographic communities,” “categories” and “sub-categories.”<sup>8</sup> For  
9 example, nowhere on PadMapper’s website will you find Listings arranged under the categories  
10 “SF Bay,” “Inland Empire” or “Gold County” in California. The navigation of Listings on  
11 PadMapper is entirely map-based. In contrast to PadMapper, the default view on craigslist is a list  
12 of short Listing descriptions within a particular city (or section of a city), arranged in descending  
13 order by how recently the Listings were posted to the site. The user can then click on a Listing  
14 description to view the actual Listing. This type of display and navigation is absent on PadMapper.  
15 PadMapper employs a singular—and uncopyrightable organizing principle—the longitude and  
16 latitude of the apartment in question. PadMapper first displays a map of the United States, with pins  
17 representing available apartments. PadMapper generates the pins (and thereby arranges the  
18 information about the apartments) based purely on the longitude and latitude of the apartment  
19 location. (DeMenthon Decl. ¶¶ 25-27.) The user can control the geographic area by zooming in or  
20 out on the map, or moving the map in any direction, allowing the user to easily filter out apartments  
21 in areas that are undesired. (DeMenthon Decl. at ¶ 26.) If a user clicks on a pin, the Summary  
22 Bubble is displayed, allowing the user to make quickly make a determination of whether to proceed  
23 to the actual Listing (on craigslist). (DeMenthon Decl. at ¶ 28.) Thus, the method of arrangement of  
24 Listings utilized by PadMapper is completely different from craigslist’s, and therefore non-  
25 infringing. See *Key Publications*, 945 F.2d at 515 (holding that defendant’s directory was not  
26

27 <sup>8</sup> The other attributes for Listings that users input using drop-down menus (housing type; laundry;  
28 parking; bedrooms; bathrooms), check (smoking; furnished; pets) or form boxes (square footage;  
rent; availability) are not used for selection or arrangement. These are in any event “not only  
unoriginal, [but] practically inevitable.” *Want Ad Digest*, 653 F. Supp. 2d at 179.

1 infringing, where categories used to arrange business listings were dissimilar in number and label).

2 *b. Use of Underlying Facts is Not Infringing Given a Weak Copyright Claim*

3 The Court should reach a similar conclusion as the courts in BellSouth, TransWestern, Le  
 4 Book, Want Ad Digest, and Key Publications, and find that PadMapper has not infringed any  
 5 copyright in craigslist's Database Compilation. craigslist exhibits minimal, if any, creativity in  
 6 selecting what to include and in arranging those Listings that it includes. PadMapper has created a  
 7 wholly distinct database, using different organizing principles. The very fact that users find  
 8 PadMapper to be useful to help sort through apartment Listings posted on craigslist is evidence that  
 9 PadMapper is not copying the selection and arrangement of craigslist's apartment listings.  
 10 Ultimately, through exaggeration of its curatorial efforts, craigslist seeks to extend the bounds of  
 11 copyright protection to protect its "sweat of the brow" efforts in building and maintaining a popular  
 12 place for people to submit and browse apartment listings. It may seem unfair to craigslist that  
 13 PadMapper be allowed to utilize the collection of apartment Listings submitted by craigslist's users,  
 14 but such a result is not only permitted by copyright, it is encouraged. Feist, 499 U.S. at 349-50  
 15 (stating that copyright "encourages others to build freely upon the ideas and information conveyed  
 16 by a work"); BellSouth, 999 F.2d at 1444-45 (observing that "[w]hile it may seem unfair for a  
 17 compiler's labor to be used by a competitor without compensation," this is not the objective of  
 18 copyright).

19 4. The software and logic underlying craigslist's database is not at issue.

20 The software underlying craigslist's database and any logic underlying the database is  
 21 similarly not at issue. craigslist's single application for registration that covers the database is an  
 22 application to register the database as part of a compilation. As such, it covers selection and  
 23 arrangement of the data and not the underlying software, or any underlying "idea, procedure,  
 24 process, system, method of operation, concept, principle, or discovery." 11 U.S.C § 102(b); see also  
 25 Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807, 815 (1st Cir. 1995) (holding that a "menu command  
 26 hierarchy" within software program that allowed users to manipulate the program was a non-  
 27 copyrightable "method of operation") However, even in the event that craigslist has a separate  
 28 application that seeks to protect rights in the software or logic of the database, there is no factual

dispute that PadMapper lacked access to these elements sufficient to copy them. PadMapper does not have, and never has had, any access, through the 3Taps API, the HTML, or from any other source, to the back-end organization of the craigslist website or database, nor to my knowledge is such back-end software or database logic accessible to any other end user of craigslist. Any such back-end organization is not visible to the end user; nor is it visible to anyone who accesses such data via an API feed, or via the site directly (by merely obtaining the HTML for a Listing, which is publicly available). PadMapper did not have access to craigslist's "back-end" and thus could not have copied such software or underlying logic. (DeMenthon Decl. ¶ 18.) Even assuming substantial similarity can be shown, any similarity must be presumed to be a result of both PadMapper and craigslist choosing the same (intuitive) logic in organizing their databases.

**E. craigslist Failed to Produce any Evidence of Significant Impairment Caused by PadMapper's Access of the craigslist Site and Thus Fails to State a Trespass Claim**

To prevail on its trespass claim, craigslist must demonstrate actual damage to its servers. See Ticketmaster Corp. v. Tickets.com, Inc., No. 99CV7654-HLH, 2003 U.S. Dist. LEXIS 6483, \*11 (C.D. Cal. Mar. 7, 2003). Such proof is lacking in this case. This Court previously acknowledged that craigslist would "need to support its claim of actual injury with evidence at summary judgment or trial" (Dkt. 74 at 24:11-12), but craigslist has failed to put forth any such evidence. Assuming craigslist suffered any damage at all resulting from PadMapper's access of the Listings—and craigslist produced no evidence of this in a year-long discovery period—that damage was *de minimis* at worst. It does not rise to the level of damage that courts require in for an actionable trespass. Accordingly, this Court should dismiss craigslist's trespass claim.

Courts have grappled with applying the old doctrine of trespass to chattels based on the allegedly unauthorized access of websites and servers. While courts have varied in their statements of the rule, the majority of courts have held that a plaintiff cannot prevail in this context unless there is some "tangible interference with the use or operation of the computer ... [or] actual dispossession of the chattel for a substantial time." Ticketmaster Corp., 2003 U.S. Dist. LEXIS 6483 at \*11. In Intel Corp. v. Hamidi, the California Supreme Court examined the viability of a trespass claim based on the transmission of unwanted emails. There the court held that while

1 electronic communications and resulting “use” of email servers may constitute a trespass, the  
 2 trespass tort “does not encompass ... an electronic communication that neither damages the  
 3 recipient computer system nor impairs its functioning.” Intel Corp. v. Hamidi, 30 Cal. 4th 1342,  
 4 1347, 71 P.3d 296 (Cal. 2003). Following Hamidi, courts have required a plaintiff to show that any  
 5 unauthorized access caused “significant” impairment. See Hernandez v. Path, Inc., No.  
 6 12CV01515-YGR, 2012 U.S. Dist. LEXIS 151035, \*22-23 (N.D. Cal. Oct. 17, 2012) (granting  
 7 motion to dismiss trespass claim on the basis of failure to allege significant impairment); LaCourt v.  
 8 Specific Media, Inc., No. 10-1256, 2011 U.S. Dist. LEXIS 50543, at \*20 (N.D. Cal. April 28, 2011)  
 9 (“the tort [of trespass to chattel] does not encompass ... an electronic communication that neither  
 10 damages the recipient computer system nor impairs its functioning.”); In re iPhone Application  
 11 Litig., 844 F. Supp. 2d 1040, 1069 (N.D. Cal. 2012) (“trespass without harm, ‘by reason of the  
 12 impairment of the property or the loss of use,’ is not actionable”) (quoting Hamidi, 30 Cal. 4th at  
 13 1351). The court in Hamidi specifically rejected plaintiff Intel’s attempt to show threshold damages  
 14 in several different ways, including reputational harm, expenditures of its employees’ time,  
 15 incremental costs, and the bare right as a property owner to exclude others from using its property.  
 16 It held that Intel failed to state a claim, because the available evidence showed that “the system  
 17 worked as designed, delivering the messages without *any physical or functional harm or*  
 18 *disruption.*” Hamidi, 30 Cal. 4th at 1360 (emphasis added). craigslist’s evidence similarly fails to  
 19 show that its servers or site experienced any physical or functional harm or disruption.

20        Apart from the time-period prior to receipt of a cease-and-desist letter during which  
 21 PadMapper accessed craigslist’s site directly, craigslist does not allege that PadMapper even  
 22 accessed craigslist’s sites or servers. Nor is there any dispute that PadMapper currently accesses  
 23 craigslist’s websites or servers: it does not. (See FAC ¶ 104; DeMenthon Decl. at ¶ 23.) With  
 24 respect to PadMapper’s access of craigslist’s website or servers prior to receipt of the cease-and-  
 25 desist letter, craigslist does not allege that such access damaged craigslist’s computer systems or  
 26 deprived craigslist of use of its computer system. It only alleges that PadMapper’s access “reduces  
 27 craigslist’s capacity to service its users because it occupies and uses craigslist’s resources.” (FAC ¶  
 28 121.) However, this allegation does not rise to the level of “significant impairment” required under

California law. It is more analogous to the allegations may by the plaintiffs in In re iPhone Application Litigation, who alleged that defendant Apple’s creation of location history files and app software components on plaintiffs’ mobile devices “consumed portions of the cache and/or gigabytes of memory on their devices,” had “taken up valuable bandwidth and storage space on their iDevices,” and “shortened the battery life of the iDevices.” In re iPhone Application Litig., 844 F. Supp. 2d at 1069. There, the district court dismissed the trespass claims, noting that “[w]hile these allegations conceivably constitute a harm, they do not plausibly establish [the necessary] significant reduction in service constituting an interference with the intended functioning of the system ....” Id.

In terms of frequency and effect, PadMapper’s past access of craigslist’s site and servers was no different than that of any crawler implemented by an internet search engine, such as Google or Internet Archive. (DeMenthon Decl. at ¶ 20.) And this access is also similar to the type of use effected by any one of the sixty million end users who access the craigslist website on a monthly basis. (See FAC ¶ 25; Balasubramani Decl. ¶ 4, Ex. B (“50 billion page views per month ... 60 million each month in the US alone ... craigslist users post well over 80 million classified ads each month”).) While these types of access may consume incremental bandwidth, none of them would cause damage to craigslist’s system or impair its functioning sufficient to state a trespass claim. As the district court noted in Tickets.com, “mere use of a spider to enter a publicly available web site to gather information, without more, is [not] sufficient to fulfill the harm requirement for trespass to chattels.” Tickets.com, 2003 U.S. Dist. LEXIS 6483, at \*12. Indeed, craigslist has produced zero evidence of such damage or actual impairment. As in Hamidi, “that [access of craigslist’s site or servers] temporarily used some portion of [its] processors or storage is ... not enough.” Hamidi, 30 Cal. 4th at 1357.

#### **F. craigslist’s Misappropriation Claim Cannot Withstand Summary Judgment**

##### **1. craigslist’s common law claim for misappropriation is preempted by the Copyright Act as there is no “extra element”.**

The Copyright Act preempts any state law claim that protects legal or equitable rights that are the equivalent to any of the exclusive rights reserved to the copyright owner without some

“extra element that makes it qualitatively different from a copyright claim.” Montz. v. Pilgrim Films & TV, Inc., 649 F.3d 975, 981 (9th Cir. 2010). Where copyright and state law causes of action overlap, courts find no preemption if the state law claim requires satisfaction of an “extra element.” Del Madera Properties v. Rhodes & Gardner, Inc., 820 F.2d 973, 977 (9th Cir. 1987). Thus, some species of common law misappropriation claims alleging that the defendant improperly exploited plaintiff’s material may survive preemption. These include claims for misappropriation based on breach of a confidential relationship or misappropriation of trade secrets. Balboa Ins. Co. v. Trans Global Equities, 218 Cal. App.3d 1327, 1352 (Cal. App. 1990). Courts are mixed on whether a misappropriation claim based on a breach of fiduciary duty claim is preempted. Id.; but cf. Del Madera, 820 F.2d at 977. On the other hand, courts agree that a claim for misappropriation of “time and efforts expended in producing” the relevant content is preempted. Del Madera, 820 F.2d at 977; Summit Machine Tool Mfg. Corp. v. Victor CNC Sys., 7 F.3d 1434, 1441 (9th Cir. 1993) (“to the extent [plaintiff] may complain that [defendant] has ‘pirated’ its lathe by employing a particularly unfair method of copying, such a claim is preempted”); Balboa Ins., 218 Cal. App. 3d at 1353 (“absent the element of a relationship, a misappropriation claim for unauthorized use or transfer of the software adds nothing to a potential copyright infringement claim”). Here, craigslist alleges that PadMapper free-rides on the efforts craigslist expends in developing its content. (See FAC ¶ 144) (“Defendants wrongfully access ... its content”; “Defendants ... have made craigslist’s content ... available to their customers and other third parties”; “Defendants’ use of ... craigslist’s content constitutes free-riding”); (FAC ¶ 145) (“As a result of this misappropriation, Defendants wrongfully compete ... .”) This type of a misappropriation claim is preempted.

2. There is no factual dispute that craigslist’s misappropriation claims fails to satisfy the elements of a “hot news” claim.

It is possible craigslist seeks to assert a claim for misappropriation under the “hot news” doctrine, which some courts have held is not preempted by the Copyright Act. See, e.g., X17, Inc. v. Lavanderia, 563 F. Supp. 2d 1102, 1105 (C.D. Cal. 2007); Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 979 (E.D. Cal. 2000). In Pollstar, the court set forth the elements of a “hot news” claim: (i) the plaintiff generates or collects information at some cost or expense; (ii) the value of the



information is highly time-sensitive; (iii) the defendant's use of information constitutes free-riding on the plaintiff's efforts to generate it; (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; and (v) the ability of the other party to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. Pollstar, 170 F. Supp. 2d at 979. A claim for "hot news" misappropriation by craigslist fails to survive summary judgment for several independent reasons. First, the value of the information is not time-sensitive (i.e., the Listings, while primarily factual are not "breaking news"). To the extent a particular apartment is still vacant, the Listing continues to be "valuable" in the sense that it is useful. Second, craigslist's and PadMapper's use of the information is not in "direct competition." As numerous end users confirmed, PadMapper's search engine functionality enhances craigslist's services and encourages end users to use such services. Finally, use by PadMapper of the Listings is not "free-riding." The INS case that is often cited to for viability of the hot news tort had a specific definition of "free-riding." International News Service v. Associated Press, 248 U.S. 215, 239 (1918). There the Court defined "free-riding" to mean "taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and ... appropriating it and selling it as the [defendant's] own ..." Id. at 239. PadMapper's limited use of the Listings Data does not satisfy either element: craigslist makes this information freely available to end users, and PadMapper likewise does not sell access to it. PadMapper attributes the limited amount of Listings Data that it displays to end users, and ultimately assists end users in finding appropriate Listings. (DeMenthon Decl. at ¶ 33; Balasubramani Decl. ¶ 3, Ex. A.) A recent Second Circuit case, Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876 (2d. Cir. 2011), is instructive as to why PadMapper's actions are not free-riding. In that case, Barclays sought to protect its securities analysts' trading recommendations, which the defendant, Fly, aggregated and distributed to its subscribers on a website. Id. at 882-83. Like craigslist, Barclays raised a misappropriation claim, but the court found it unpersuasive:

the Firms' claim is not a so-called INS-type non-preempted claim because Fly is

not, under *NBA's* analysis, 'free-riding.' It is collecting, collating and disseminating factual information — the facts that Firms and others in the securities business have made recommendations with respect to the value of and the wisdom of purchasing or selling securities — and attributing the information to its source. The Firms are making the news; Fly, despite the Firms' understandable desire to protect their business model, is breaking it.

*Id.* at 902. PadMapper's actions present even less of a case for misappropriation than the defendant in *Barclays*. PadMapper has aggregated pointers to listings from numerous sources — always making clear to the user who that source is—along with useful analysis that enhances their value to consumers. (DeMenthon Decl. ¶¶ 28, 33.) This is not "free-riding"; it is a value-added service that gives credit (and refers end users) to craigslist, as well as additional utility to consumers.

### CONCLUSION

craigslist seeks to stretch the bounds of copyright protection to prevent PadMapper from using factual data underlying its Listings in a way that is undoubtedly beneficial to end users. PadMapper's use the data underlying the Listings to facilitate its search functionality is classic fair use. Similarly, craigslist has thin copyright protection, if at all, in its Compilation application. It exerts no creativity or judgment in selecting the Listings for inclusion. PadMapper does not use any protectible elements of copyright protection that craigslist may have in its compilation. Accordingly, the Court should grant summary judgment as to craigslist's copyright claims.

The Court should similarly grant summary judgment as to craigslist's trespass and misappropriation claims. craigslist has not produced any evidence that PadMapper's crawler—which functions similar to any mainstream search engine—caused any impairment or harm to craigslist's site or servers. Similarly, craigslist's common law misappropriation claim is preempted. It fails to put forth any evidence necessary to support a "hot news" claim for misappropriation.

DATED: October 3, 2014

FOCAL PLLC

By:

/s/Venkat Balasubramani

Venkat Balasubramani (SBN 189192)

Attorneys for Defendant  
PADMAPPER, INC.

1 I, Sean M. McChesney, hereby attest, pursuant to N.D. Cal. Local Rule 5-1(i)(3), that the  
2 concurrence to the filing of this document has been obtained from each signatory hereto.

3 DATED: October 3, 2014

FOCAL PLLC

4 By:

5 /s/Sean M. McChesney

6 Sean M. McChesney (admitted *pro hac vice*)

7 Attorneys for Defendant  
8 PADMAPPER, INC.